STATE OF MICHIGAN
IN THE SUPREME COURT

JOAN M. GLASS,

Plaintiff/Appellant

v

RICHARD A. GOECKEL
and KATHLEEN D. GOECKEL,

Defendants/Appellees

Supreme Court Dkt No.126409
Court of Appeals No. 242641
Alcona Circuit Ct. No. 01-10713-CK

/

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/

BRIEF OF AMICI CURIAE

SAVE OUR SHORELINE
AND
GREAT LAKES COALITION, INC.

Submitted by:

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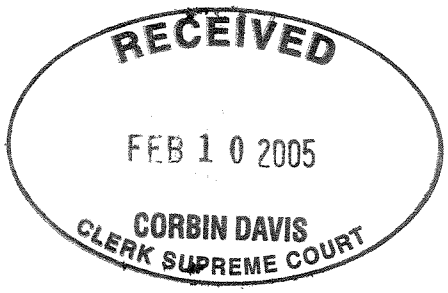

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STATEMENT OF BASIS OF JURISDICTION

Amici Curiae adopt Appellees' Statement of Basis of Jurisdiction.

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STATEMENT OF QUESTIONS PRESENTED

I. UNDER MICHIGAN LAW, DO OWNERS OF PROPERTY ABUTTING THE GREAT LAKES OWN TO THE WATER'S EDGE AT WHATEVER STAGE FREE OF THE PUBLIC TRUST?

Trial Court's Answer	: No
Court of Appeals' Answer	: No
Plaintiff/Appellant's Answer	: No
Defendant/Appellee's Answer	: Yes
Amici's Answer	: Yes

II. DOES THE GREAT LAKES SUBMERGED LANDS ACT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE?

Trial Court's Answer:	: Yes
Court of Appeals' Answer	: Did not answer
Plaintiff/Appellant's Answer:	: Yes
Defendant/Appellee's Answer:	: No
Amici's Answer	: No

III. WILL REAFFIRMING *HILT* HAVE THE ADVERSE EFFECTS WHICH PLAINTIFF AND AMICI ASSERT?

Trial Court's Answer:	: Did not answer
Court of Appeals' Answer	: Did not answer
Plaintiff/Appellant's Answer:	: Yes
Defendant/Appellee's Answer:	: No
Amici's Answer	: No

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STATEMENT OF FACTS

Amici Curiae adopt Appellees' Counter Statement of Facts.

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INTEREST OF AMICI CURIAE

Formed in August of 2001, Save Our Shoreline ("SOS") is a Michigan nonprofit membership corporation committed to the preservation of riparian rights, which in Michigan includes the right of ownership of Great Lakes riparian lands to the water's edge, wherever that may be at any given time. Since its formation in 2001, the grass-roots group has rapidly grown to over 2,000 households. SOS members have a direct and substantial interest in this Court's decision regarding the extent and nature of their ownership of Great Lakes riparian lands. In addition to its amicus effort in this litigation, the group recently pursued and obtained passage in this state of 2003 PA 14, which relates to a riparian's right to maintain their waterfront property, including the control of vegetation on Michigan's beaches. The group has also participated by way of amicus brief in *Borden Ranch Partnership* v *US Army Corps of Engineers*, 536 US 903; 122 S Ct 2355 (mem); 153 L Ed 2d 178 (2002), regarding the reach of federal statutes over Great Lakes beaches as well as other matters. The organization is responding to what it perceives as an organized effort, which includes units of state and federal government, and others, to increase public control of the lakeshores, to the prejudice of private owners and the principle of private property. The theories proffered by Plaintiff and her amici in this case have been specifically used and developed as part of that effort.

Incorporated as a Michigan non-profit corporation in 1986, the Great Lakes Coalition, Inc. represents thousands of Great Lakes private property owners. Also known as the International Great Lakes Coalition, it works directly with the International Joint Commission, Boards of Control, and federal and state entities on issues of concern to lakefront owners. It also provides to such entities technical and scientific research, and participates in various studies regarding the Great Lakes. It was incorporated in 1986 as a Michigan non-profit corporation.

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This brief is the product of substantial legal research commissioned by the amici herein and ongoing continuously back to 2001, and benefits from the input of dozens of attorneys from throughout the Great Lakes region who have provided substantial input and research materials.

ARGUMENT

I. UNDER MICHIGAN LAW, OWNERS OF PROPERTY ABUTTING THE GREAT LAKES OWN TO THE WATER'S EDGE, AT WHATEVER STAGE, FREE OF THE PUBLIC TRUST.

A. Introduction.

The issue before the Court has been considered by "an authoritative source that has been relied upon by property law practitioners in Michigan for nearly 50 years." OAG No 7147 (January 9, 2004). That source—the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan—has adopted the following standard:

> The waterfront boundary line of property abutting the Great Lakes is . . . the naturally occurring water's edge.[1]

Land Title Standards, 5th Ed, Standard 24.6.

The Committee correctly cites *Hilt* v *Weber*, 252 Mich 198; 233 NW 159; 71 ALR 1238 (1930) as its primary authority. Amicus submits that the Attorney General was correct; that the land title standard is indeed authoritative on this issue; and that *Hilt* v *Weber* does indeed resolve the issue before this Court.

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[1] In a caveat, the Land Title Standard considers, but rejects, the proposition that the "ordinary high water mark" represents the boundary. The Land Title Standards Committee includes "only those principles of land title law which are clearly supported by the law of the state . . . as to which there are relevant statutes or cases which are reasonably definitive in their effect or holding. Points of law that are subject to some dispute, or as to which there are conflicting opinions, are not included . . . *Id.*, preface. Contrast this land title standard with the assertion of Amicus Tip of the Mitt that "the water's edge claims advanced by Defendants-Appellees and Amicus Curiae SOS and Chamber . . . represents [sic] a radical change in Michigan's property rules pertaining to the Great Lakes Shoreline." Brief of Tip of the Mitt, pp 19-20.

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B. The Seminal Case of *Hilt* v *Weber* Governs this Case.

The issue before this Court is governed by this Court's landmark decision of *Hilt* v *Weber*, *supra*, in which this Court clearly and unambiguously held that shoreline property owners on the Great Lakes own to the water's edge, at whatever stage. The decision also specifically dispelled the notion that the public trust extended landward beyond the water's edge. Since its issuance in 1930,[2] the decision has stood unscarred, being neither overturned nor criticized by any Michigan case. To the contrary, its principle of ownership to the water's edge at whatever stage was reaffirmed in numerous cases, most recently by this Court in *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994), a case which specifically held that the riparian owner, and not the public, owned the beach between the water's edge and the so-called "ordinary high water mark."[3] Under the authority of these cases, the argument that the public has any fee

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[2] The law in *Hilt* was well established long before Plaintiff purchased her property, and began traversing the beaches at issue.

[3] The concept of "ordinary high water mark" is often referred to, but seldom defined, in case law, and is further clouded by many varied judicial, statutory, and administrative definitions and references. For example, early decisions relate the mark in terms of tidal changes in water level (which occur twice daily), exclusive of other types of change. See, eg, *People* v *Warner*, 116 Mich 228; 74 NW 705 (1898). Others refer to other periodic changes uninfluenced by tide. *See Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923). On the Great Lakes, the water cycle from high to low water and back can be thirty to forty years or more. (See Appendix 1). This difference becomes significant when trying to extrapolate a rule for tidal waters, and apply it to non-tidal waters, as Plaintiff does in her brief. For example, while tidal waters are "incapable of cultivation or improvement," Great Lakes shorelands, portions of which may be dry for upwards of 40 years, have regularly been built upon. *Shively* v *Bowlby*, 152 US 1, 57 (1894); *see, eg, Kavanaugh* v *Baird*, 241 Mich 240; 217 NW 2 (1928), *rev'd* 253 Mich 631; 235 NW2d 871 (1931) (cottage built on relicted land). Even in the Great Lakes, the meaning differs. While court decisions refer to a mark on the shore, or the absence of vegetation, at least two administrative agencies have adopted fixed elevations. For example, MCL 324.32501 et seq. sets a level of 579.8 feet above sea level; the MDEQ asserts the level is 580.5 feet; the U.S. Army Corps of Engineers asserts the mark is at 581.5 feet; some court decisions, discussed later in this brief, suggest that due to lack of tides, low and high water marks may be the same. Complicating the concept of ordinary high water mark are manmade influences such as dredging, water diversion, and gravel mining, which have lowered lake levels. Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," pp 74-75; *see also* "Region's Disappearing Resource," Detroit Free Press (January 25, 2005) (Appendix 2). Thus, the term means different things to different people.

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ownership interest in property between the water's edge and the so-called "ordinary high water mark" must fail.

The decision of *Hilt* v *Weber*, *supra*, is widely cited by state and national authorities for its determination of the boundary for the intersection between the Great Lakes and riparian land. In *Hilt*, a land contract purchaser of shoreline property, in defending against foreclosure, asserted that the seller misrepresented the property line as a boundary near the water. He argued that the meander line,[4] being 277 feet from the water, was the boundary under the authority of *Kavanaugh* v *Rabior*, 222 Mich 68; 192 NW 623 (1923) and *Kavanaugh* v *Baird*, 241 Mich 240; 217 NW2d 2 (1928); *rev'd* 253 Mich 631; 235 NW 871 (1931) (hereinafter the "*Kavanaugh* cases"). The *Hilt* Court expressly overruled the *Kavanaugh* cases, and held that because the boundary line extended to the water's edge, no damage occurred from misrepresenting the boundary line as being 100 feet from the water.

A study of the *Hilt* decision and its history reveals its intellectual and historical significance. According to Professor Theodore Steinberg, a presidential scholar at the University of Michigan, "[b]efore the *Kavanaugh* case, property owners along Michigan's shores believed that they owned to the water's edge," which "seemed to be a sensible boundary." Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," The American Journal of Legal History, Vol. XXXVII, p 72 (1993) (*See* Appendix 3). The *Kavanaugh* cases changed that historical and legal understanding, and "converted to public property Michigan's hundreds and hundreds of miles" of shore. *Id.* at 77.

[4] A meander line, according to *Hilt*, is simply an approximation of a shoreline boundary for the purpose of computing the amount of acreage sold by the government, and was never intended to be a boundary in fact. *Hilt* at 204-206.

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According to Steinberg—whose article offers a rich and detailed account of the *Hilt* decision and the facts and circumstances that led to the decision—the judicial appropriation effected by the *Kavanaugh* cases caused a flurry of new activity. Shoreline renters began to withhold rent. Surveyors began marking the new property lines. Shoreline owners organized. Real estate brokers complained, and a bill before the Legislature to clarify the water's edge as the boundary was passed, but vetoed by the governor. In some areas of the state, hundreds of feet of property between the water's edge and upland property was declared public land. *Id.* at 77-78, 82. In light of this legal turmoil, this Court promptly accepted the *Hilt* case for review and set forth its reason for doing so:

> Because of the conflict of authority, and also because the executive and legislative branches of the state government have felt the need of more precise statement of the legal situation as a basis of legislation, we finally determined upon a frank re-examination of the *Kavanaugh* cases . . .

Hilt at 202. The Court noted that in addition to the briefs of the parties, it had the benefit of those of "the attorney general and others representing public and private interests as *amicus curiae*." *Id.* Hence, the *Hilt* decision is not some ordinary decision on the topic; it was a momentous decision intended to clarify a serious legal problem to a young, developing state. A studied reading of the exhaustive decision evidences the fact that the Court intended the decision to be the final word on the issue, not only by the decision's legal standing, but by the strength of its reasoning. In its analysis, the *Hilt* Court carefully and methodically addressed all of the arguments that might be brought to bear on the issue, including an historical analysis of relevant federal and state decisions and consideration of the public trust doctrine. With virtually every page of the *Hilt* decision carefully crafted, and in light of the historical background, there can be no doubt that this Court knew of the import of its decision; that it applied the appropriate amount

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of resources in finding and determining the law; and that it intended to bring final resolution to the issue of shoreline ownership in Michigan.

(1) Factual Background of the Hilt Decision.

The allegations of fraud in *Hilt* arose from a visit to the property on December 1, 1925 (*See* Record, *Hilt* v *Weber*, p 88-91, attached hereto as Appendix 4). At that time, the seller's agent represented that a stake "driven in the shore 100 feet from the water" represented the boundary. *Hilt* at 201. The water at this point in time was extraordinarily low. A review of data from the U.S. Army Corps of Engineers demonstrates that from 1918 through 2002, Lake Michigan water levels have fluctuated by over six feet, with record highs and lows appearing on a 25 to 40 year cycle, and with near record low water levels on December 1, 1925 (*See* Appendix 1). Indeed, it appears from the chart that only about four to six months from the chart's 84-year coverage saw equal or lower water levels. In other words, since 1918 the water has been higher than at the time of the *Hilt* dispute about 99.5% of the time.

In *Hilt*, the "disputed strip" of land at issue involved the land (or shore) between the stake and the meander line 277 feet from the water. Thus, the "disputed strip" involved land starting 100 feet from the water, and extending 177 feet upland. The Court revealed that at least a portion of this 177-foot strip of land was "made dry land partly by accession and partly by reliction." *Id.* at 201. As explained in Section I(D) below, the term "reliction," as it was used by the Court, specifically includes the cyclical fall of water levels in the Great Lakes.[5] Thus, the issue in *Hilt* specifically involved the nature of the ownership of land which was made dry by the cyclical recession of water on the Great Lakes. As a result, the *Hilt* conclusions about ownership

[5] Plaintiff's assertion at p 2 of her Brief that the land at issue was "permanently relicted and accreted upland above the high water mark" is unsupported and belies the *Hilt* record. *See Hilt* record, pp 90-91: ("beach extends back from the water's edge...over 100 feet...[which] was formerly lake.") (*See* Appendix 2).

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of relicted land were not *dictum*, as asserted by Tip of the Mitt,[6] but were essential to the case. Further, because no rule of law would distinguish between ownership of the relicted land at issue in *Hilt*, and the relicted land represented by the first 100 feet from the water's edge in that case, the rule announced by *Hilt* necessarily applies to such land.[7]

(2) Federal and State Decisions; Ownership to Water's Edge.

On commencing its analysis, the *Hilt* Court first noted that even in the earlier, contrary case of *Kavanaugh* v *Baird*, *supra*, the Court had acknowledged that "the decision was against the weight of authority, supported by the fact that the contrary authority is substantially unanimous, in state and federal courts, in this country and England." *Hilt* at 203.[8] As for federal law, the Court cited *St Paul & P R Co* v *Schurmeier*, 74 US (7 Wall) 271, 286; 19 L Ed 74 (1868) ("the water-course, and not the meander-line, as actually run on the land, is the true boundary") and *Hardin* v *Jordan*, 140 US 371, 380; 11 S Ct 808, 811; 35 L Ed 428 (1890) ("the waters themselves constitute the real boundary"). After citing additional cases from other Great Lakes states, the Court concluded that under federal law, "the purchaser from the government of public land on the Great Lakes took title to the water's edge (emphasis added)." *Hilt* at 206.

While not cited by the *Hilt* Court, its conclusion was consistent with a decision of the U.S. Supreme Court only five years earlier in *Massachusetts* v *New York*, 271 US 65; 46 S Ct

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[6] Brief of Tip of the Mitt, pp 7-8.

[7] Indeed, the *Hilt* Court seemed to find that by referring to the stake 100 feet from the shore, Plaintiff did indeed misrepresent the boundary, but since Defendant actually owned to the water's edge, he suffered no harm: "Under this ruling, Defendants suffered no damage from misrepresentation of the boundary line." *Id.* at 227.

[8] The *Kavanaugh* v *Baird* decision provided at p 252:

> These holdings may be out of line with the holdings in other jurisdictions. They may be out of line with the writings of textwriters and the decisions of other courts. We may concede them to be against the overwhelming weight of authority, but we should not overrule them . . . (emphasis added).

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357; 70 L Ed 838 (1926), which distinguished between tidal and non-tidal waters in determining the boundary along the shore of Lake Ontario. The Supreme Court held that "there are no public rights in the shores of non-tidal waters," rejecting the rule for tidal waters that carried "to highwater mark." *Id.* at 92, 93. *See* also *Vermont* v *New Hampshire*, 289 US 593; 53 S Ct 709; 77 L Ed 1392 (1933) ("there are no public rights in the shores of nontidal waters . . . [but] a different rule has been applied in the case of grants bounded by tidal waters, which carry only to high water mark. *Shively* v *Bowlby*, 152 US 1, 57; 14 S Ct 548; 38 L Ed 331 (1894").[9]

(3) Michigan Property Rights Are Defined by Michigan Law.

The *Hilt* Court next held that once waterfront property was acquired by a private person, state law, and not federal law, controlled[10] the extent of that person's rights:

> The state law became paramount on the title after it vested in a private person.

Id., citing *Hardin* v *Jordan*, *supra*. This proposition was espoused by the Court in *Kavanaugh* v *Baird*, *supra*, at 254, and by the Brief of the Attorney General acting as Amicus Curiae in the *Hilt* case.:

> It is a settled rule of law that each state determines for itself the question of the rights of the riparian owner.

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[9] Amicus Tip of the Mitt criticizes *Hilt* by arguing that the state took title to the ordinary high water mark, citing *Shively* v *Bowlby*, *supra*. This criticism is misplaced. *Shively* involved tidal waters. Further, the brief makes no mention of *Massachusetts* v *New York*, *supra*, or *Vermont* v *New Hampshire*, *supra*, the latter of which specifically distinguishes *Shively* in holding that there were no public rights in the shores of non-tidal waters. *See* Tip of the Mitt Brief at p 8. The brief does not cite a case involving the Great Lakes. Amicus Tip of the Mitt also suggests that the federal Submerged Lands Act, 43 USC §1301 *et seq.*, established state title to the ordinary high water mark. *See* Tip of the Mitt Brief, p 12. Amicus misconstrues the act, which "creates no new rights for the states," and "is not a grant of title to land, but only a quitclaim of federal proprietary rights in the beds of navigable waterways." *Bonnelli Cattle Co* v *Arizona*, 414 US 313; 94 S Ct 517; 38 L Ed 2d 526 (1973); *see also* 43 USC §1311.

[10] Plaintiff apparently concedes this point. *See* Plaintiff's Brief, p 14.

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(*See* Appendix 5, p 1). This remains the law today. *See Oregon* v *Corvallis Sand & Gravel Co*, 429 US 363, 372; 97 S Ct 582; 50 L Ed 2d 550 (1977) ("that land had long been in private ownership and, hence, under the great weight of precedent from this Court, subject to the general body of state property law").[11]

(4) Under Michigan Law Prior to Hilt, Shoreline Owners Owned to the Water's Edge.

After examining and exposing the underpinnings of previous cases on the subject, the *Hilt* Court concluded that prior to the *Kavanaugh* decisions, "this Court, in common with public opinion and in harmony with the weight of authority, assumed, without question, that the upland proprietor owns to the water's edge . . . (emphasis added)." *Id.* at 212. A detailed review of those cases supports that assertion.

That the water's edge was the boundary between public and riparian ownership was first suggested early in this state's jurisprudence in *La Plaisance Bay Harbor Co* v *Council of City of Monroe*, Walk Ch 155 (1843):

> So, with regard to our Great Lakes, or such parts of them as lie within the limits of the state; the proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake (emphasis added).

[11] Plaintiff and Amicus Tip of the Mitt assert that under the authority of *Illinois Central RR Co* v *Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892) and *Shively* v *Bowlby*, *supra*, the U.S. Supreme Court "extended the public trust doctrine to the shores of the Great Lakes," and that the state is powerless to define the landward extent of the public trust doctrine short of the ordinary high water mark. Plaintiff's Brief, pp 10, 13; Tip of the Mitt Brief, p 22. Neither proposition has merit. It is true that the *Illinois Central* Court, without identifying whether it was applying Illinois law, federal common law, or some other principle, did apply the public trust doctrine to the Great Lakes. Yet there is no mention of the extent of its application to any water mark other than a reference to land under water. *Id.* at 452 ("state holds the title to the lands under the navigable waters" and "control over the waters above them, whenever the lands are subjected to use (emphasis added)." The case involved only lands submerged by water in fact. The Court's subsequent decisions in *Massachusetts* v *New York*, *supra*, and *Vermont* v *New Hampshire*, *supra*, clarify that the public's rights on the Great Lakes end at the water's edge. Even if the public trust along Great Lakes shores extended beyond the water's edge at the time of the federal grant, the Court has held that "it has long been established that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they *see* fit." *Phillips Petroleum Co* v *Mississippi*, 484 US 469, 476; 108 S Ct 791; 98 L Ed 877 (1988).

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Id., cited in *People* v *Silberwood*, 110 Mich 103, 106; 67 NW 1087 (1896). Thus, only five years after admission to the Union, this Court recognized in plain language that while title to land covered by water is in the state, the "adjacent shore" is not. The term "shore" is typically defined as "[t]he space bounded by the high and low water marks." Black's Law Dictionary (West 1979). Thus, this Court in *La Plaisance* identified the border between state and private land: the low water mark, or higher on the shore to the point where the land is no longer "covered by water."

Forty years followed the *La Plaisance* decision with relative silence on the issue of riparian ownership. But the next 46 years, commencing in 1884, saw a flurry of decisions from this Court that culminated in the *Hilt* decision in 1930. The *Hilt* decision has been followed without question in *Donahue* v *Russell*, 264 Mich 217; 249 NW 830 (1933) ("the riparian owner owns the land beyond the meander line to the edge of the waters"); *Staub* v *Tripp*, 253 Mich 633; 235 NW 844 (1931) ("title extended beyond the meander line to the water's edge"); *Klais* v *Danowski*, 373 Mich 262; 129 NW 414 (1964) (riparian's title extends to the water's edge during periods of low water). More recently, the *Hilt* holding was renewed in 1994 by *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994) (riparian owns beach below ordinary high water mark).

Without reference to *La Plaisance*, *supra*, this Court in *Lincoln* v *Davis*, 53 Mich 375; 19 NW 103 (1884) could not find complete agreement on the extent of riparian ownership, despite agreement in the result. The case involved the lessee of an island and his removal of the plaintiff's fishing nets from the water in front of the island. The majority opinion affirmed a judgment of damages for trespass in favor of plaintiff. That was based on the existence of a statute governing navigable water which precluded "private erections" in such water. The Court

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held that while the state may act, a private person could not act to remove another person's stakes unless they were nuisances. Since these nets were not nuisances, the riparian owner wrongfully removed the nets, and plaintiff was entitled to recover for defendant's wrongful act of removing plaintiff's property. *Id.* at 391.

While the majority held that plaintiff's riparian rights did not extend to the right to remove the fishing net and stakes in the case, it was not prepared to further limit riparian rights:

> I am not prepared to hold, however, that lands under water are not appurtenant to the upland so far as they can be used at all (emphasis added).

Id. at 392. Thus, the majority was unwilling to accept concurring Justice Champlin's claim that the riparian's title did not extend lakeward of the low water mark. But on one point the Court was unanimous: on the Great Lakes, there is no distinction between low and high water mark:

> I think there is no doubt of the right of the owner of lands on the borders of the lakes to make such use of the covered lands adjacent as will not injuriously affect navigation; and that there is no proprietary division known on these waters as high or low water mark. I agree that it depends on the law of the state how far rights may be exercised consistently with public easement of navigation in the submerged lands (emphasis added).

Id. at 389-390. By this language, Justice Campbell was expressing his agreement on this issue with that of concurring Justice Champlin. Champlin analogized the Great Lakes to the seas, which:

> would seem to call for the application of the same principles as to boundaries which were applied to lands bordering on those seas, with this difference: as there is no periodical ebb and flow of tide in these waters the limit should be at low instead of at high water mark.[12]

Id. at 385. Contrary to the majority opinion, the concurring justice had "no hesitation in saying" that the boundaries of the government's grant to the island in question is "limited by low water mark." *Id.* at 384-385. Thus, a reader of this decision in 1884 would fairly conclude that

[12] This view was accepted by the U.S. Supreme Court. *See Vermont* v *New Hampshire*, *supra.*

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according to the unanimous opinion of the state's highest court, the public's title would in no case extend upland beyond the low water mark.

Four years later, Justice Champlin wrote the majority opinion in *Sterling* v *Jackson*, 69 Mich 488; 37 NW 845 (1888), a decision involving the public right to navigate and hunt in water over privately owned soil traced to a swamp land patent. The Court held that under such a patent, the patent holder owned the patented soil beneath the waters of the Great Lakes. As a result, although the Defendant, as a member of the public, was entitled to use of the water because of the paramount right of navigation,[13] that right was not without limits:

> So long as that license continued, he could navigate the water with his vessel, and do all things incident to such navigation. He could seek the shelter of the bay in a storm, and cast his anchor therein; but he had no right to construct a "hide," nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and in doing them, Defendant was not exercising the implied license to navigate the waters of the bay, but they were an abuse of such license (emphasis added).

Id. at 497. This Court affirmed a judgment of trespass. The two dissenting justices would not have granted such a limitation on the public's rights. Yet both seemed to assume the riparian's ownership of the shore. Concluding that "there is no part of the open water from which the riparian owner can exclude the public," Justice Campbell emphasized that "the riparian owner's rights in the bed away from the shore are purely theoretical and valueless (emphasis added)." *Id.* at 509. And in his dissent, Justice Morse referred to the "riparian owner of the shore," preceded by an assertion of his right, as a member of the public, to "lie dreamily in [his] . . . anchored boat . . . [and] to note the ripple of its waters as they beat upon the shores of the riparian owner

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[13] It is important to distinguish this right of navigation with those rights under the public trust. Had Defendant been hunting on waters over state lands held in public trust, he would not have been so limited. But because he was on waters over lands held by Plaintiff in fee, he was limited only to rights of navigation.

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(emphasis added)." *Id.* at 535, 537. Thus, once again, a reader of this decision would conclude that no public rights extended beyond where the water met the shore.

The low water mark was again referenced in *People* v *Silberwood, supra.* In that case, the defendant was convicted of cutting vegetation growing on submerged land in front of his shoreline property, in violation of a state statute. He claimed that as a riparian, he owned to the center of Lake Erie and had the right to cut the vegetation. The Court disagreed. New to the Court, Justice Moore's opinion twice referred to *La Plaisance Bay Harbor Co* v *Council of City of Monroe, supra*, quoting the passage referenced above:

> [T]he proprietor[14] of the adjacent shore has no property whatever in the land covered by the water of the lake.

Id. at 106. The unanimous Court also held that "[t]his doctrine is in harmony with the decisions of all the states bordering on these great seas." *Id.*, 110 Mich at 108-109. The decisions which Justice Moore's opinion referenced were from New York, Pennsylvania, and Ohio, all holding that "the fee of the riparian owner ceases at the low water mark (emphasis added)." *Id.* at 107. The decision then quotes with approval the opinion in *Illinois Central R Co* v *Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892): "the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states belong to the respective states," and that "the same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes . . . (emphasis added)." *Silberwood* at 107. Thus, this Court in *Silberwood* unanimously confirmed the public trust doctrine for lands covered by water, and

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[14] Black's Law Dictionary (West 1979) defines the term "proprietor" as "one who has the legal right or exclusive title to anything. In many instances, it is synonymous with owner." That dictionary also defines "shore" as "[the] space bounded by the high and low water marks."

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further unanimously confirmed that the riparian's fee title ended at the low water mark, where the state's title began.[15]

This Court received little rest on the issue of riparian ownership. Less than two years after *Silberwood*, the Court, without any change in its composition, decided *People* v *Warner*, 116 Mich 228; 74 NW 705 (1898). *Warner* involved the ownership of a marshy island in Saginaw Bay, which was once submerged, but over time became exposed. Warner, being the owner of an adjacent dry island, claimed he owned the marshy island as an accretion to his island. The state claimed the marshy island was an accretion to islands over which it asserted fee ownership, and not simply ownership as part of the bed of the lake. The trial court directed a verdict in favor of the state. This Court reversed, and ruled that a factual dispute existed as to whether the marshy island "gradually extended" from a point on Warner's island, or whether land arose from the water and was later then connected to Warner's island "at times of low water (emphasis added)." *Id.* at 240, 241. The Court, through Justice Hooker, stated its view of the law:

> So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the state, would be the owner . . . (emphasis added).

Id. at 239. The *Warner* Court knew it was dealing with a case of low cyclical water, and applied the rule of reliction to such facts. It noted that the land at issue "has appeared above the water "since surveys were conducted." *Id.* at 235. And it found necessary an inquiry whether land was revealed "at times of low water." *Id.* Yet its reference to a difference between high and low water marks related only to such marks as set by tides:

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[15] The *Hilt* decision, while referring to the *Silberwood* decision, does not fully acknowledge the clarity of the Court's decision on the issue of shoreline boundary at the low water mark.

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> The depth of water upon submerged land is not important in determining the ownership. If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there, and there that of the state begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation.

Id. at 239. By this language, the Court once again clarified that the state's land is that which is covered by water, though that water may be of shallow depth. Without deciding whether tides have an effect on the Great Lakes, the Court suggested that the absence of tide "makes high and low water mark identical." *Id.* at 239. The resulting water mark—the water's edge—is the boundary, with the state owning all land covered by water, but not relicted land. By placing the low water mark, high water mark, and water's edge at the same line (in the absence of tidal influence), the Court stayed in intellectual harmony with *Silberwood*'s reference to the low water mark as the boundary. Having acknowledged fluctuations in Great Lakes water levels ("times of low water") while suggesting the lack of tide would make low and high water mark identical, the *Warner* decision calls for but one water boundary as acknowledged by *Hilt*: the water's edge. *Hilt*, *supra*, at 222. The *Warner* decision is of special significance because of the *Hilt* Court's suggestion that overruling the *Kavanaugh* cases, as it did, would re-establish *People* v *Warner*, *supra*, overruled by them. *Hilt* at 223.

Only three years later, and again without any change in composition, this Court considered *State* v *Lake St Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901). The majority opinion did not address the issue of boundary, but Justice Hooker, who concurred[16]

[16] Both Tip of the Mitt, at page 23, and Plaintiff, at pages 15-17, misrepresented the concurrence as the Court's decision, despite Amici bringing this fact to Plaintiff's attention in responding to Plaintiff's Application. *See* SOS and Great Lakes Coalition, Inc.'s Brief, p 19. Plaintiff brazenly asserts that the *St Clair* decision "affirmed that public rights in Great Lakes water extend to the high water mark (emphasis added)." Justice Montgomery's majority opinion holds nothing of the sort, and the conclusions of concurring Justice Hooker are quite the opposite as to lands adjacent to patented lands.

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in the *Silberwood* decision, and who wrote the *Warner* opinion, wrote an extensive concurrence. If there was any doubt about Justice Hooker's interpretation of the law in his *Warner* opinion and his concurrence in earlier cases, he clarified it in this concurrence:

> Under the cases of *People* v *Silberwood*, 110 Mich 103 (67 NW 1087, 32 LRA 694), and *People* v *Warner*, *supra*, it must be taken as settled law that all land submerged, when the water in the lakes stands at low-water mark, is a part of the lake, and the title in the state, and all land between the low-water mark and the meander line belongs to the abutting proprietor, holding under an ordinary patent from the federal government or state (emphasis added).

Id. at 590. Thus, while Justice Hooker clearly believed that the privileges of the public "extend to high water mark in all tide waters," he acknowledged that on the Great Lakes, the tides have "a trifling effect if they can be said to exist." *State* v *St Clair Fishing & Shooting Club* at 586; *Warner* at 239. As a result, he found them to be governed by a different rule: one that sets the boundary between the state and an abutting riparian firmly at the low water mark, at least where the water is no higher.

After a long period of substantially consistent decisions from this Court announcing riparian ownership of the shores—while recognizing public trust rights in the soil covered by water—the rule was blurred by a newly composed court in *Ainsworth* v *Munoskong Hunting & Fishing Club*, 159 Mich 61; 123 NW 802 (1909).[17] That case—later expressly overruled in *Hilt* v *Weber* (see discussion below)—involved a riparian's interference with hunters in the waters of Munoskong Bay, and his claim of ownership of submerged land. There was no claim that the submerged land was ever dry; defendant simply asserted he owned to the middle of the water.

Key to understanding Justice Hooker's reference to the high water mark—and omitted by Plaintiff—is the Court's explaining that the "submerged land" in question was an island with no abutting proprietor, "separated from the Michigan shore at all points by open water." *Id.* at 585.

[17] Only Justices Moore and Grant remained from the Court that decided *Silberwood*, *Warner*, and *St Clair Fishing & Shooting Club*, *supra*.

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Citing the *La Plaisance*, *Lincoln*, *Silberwood*, *Warner*, and *St Clair Fishing & Shooting Club* decisions, two of which found him in the majority,[18] Justice Grant announced:

> It is the established law of this state that riparian owners along the Great Lakes own only to the meander line, and that title outside this meander line, subject to the rights of navigation, is held in trust by the state for the use of its citizens (emphasis added).

Id. at 64. The Court also asserted: "In these cases, and others cited therein, the subject has been fully discussed, and further discussion here would be unprofitable." *Id.* Of course, while the cited decisions acknowledged the public's rights in submerged lands, each of them cite the shore or the low water mark as the boundary, and not the "meander line." The *Hilt* decision well explained the error in the *Ainsworth* Court's choice of words, and specifically overruled the "meander line" statement as an unfortunate mistake by the Court, resulting in part from the fact that the "meander line" and the waterline were the same under the facts of that case; the terms were used interchangeably in the case; and "the bill conceded that defendant owned to the water's edge":

> The dictum in *Ainsworth* v *Hunting & Fishing Club*, *supra*, 'that riparian owners along the Great Lakes own only to the meander line' is overruled.

Hilt, 252 Mich at 207, 208-213, 227.

The overruled *Ainsworth* case was followed by *State* v *Venice of America Land Co*, 160 Mich 680; 125 NW 770 (1910). That case involved title to a portion of an island that was periodically submerged, including being so at the time of statehood. The defendant claimed he owned the land as a result of a chain of title leading back to a grant from the British government, "antedating the title of the United States." *Id.* at 682. The Court's decision does not reflect a consideration of whether defendant owned the land as a riparian owner of adjacent upland,

[18] This would include the *Silberwood*, *supra*, and *Warner*, *supra*, decisions.

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though it stated that the fact that the land is "unsurveyed lands, and within the meander lines, is significant." *Id.* at 701. The Court affirmed the trial court, which held that defendant's predecessor "never had title" to the land at issue. *Id.* at 689.

The unanimous decision joined by Justice Hooker, the writer of the *Warner* opinion, referred with approval to his concurring opinion in *State* v *St Clair Fishing & Shooting Club*, *supra*, describing it as:

> An exhaustive discussion of the nature of the state's title to the land beneath the waters of the Great Lakes . . .

Id. at 702. Thus, the *Venice of America Land Co* majority likely was approving Justice Hooker's view of riparian ownership to the low water mark, at least where dry.[19]

Thus, with the exception of the mistaken, overruled *Ainsworth* case, Michigan law, as announced in this Court's opinions, was consistent from the 1843 *La Plaisance* decision through the 1910 *Venice of America Land Co* decision that the state's fee ended at the low water mark, or perhaps the water's edge, if higher. The *Hilt* decision properly found that the riparian owned to the water's edge.

(5) The Public Trust Doctrine Ends at the Water's Edge.

The *Hilt* Court acknowledged that the so-called[20] public trust doctrine (termed the "trust doctrine" by the Court) had been recognized by Michigan courts as early as 1843 in *La Plaisance*

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[19] Plaintiff's assertion at page 17 of her Brief that *Venice* committed the Court to a principle that "the state holds title of all lands below high water mark" is unsupportable. As the *Hilt* Court noted, the *Venice* case was not a boundary case, and "[n]o question was raised of reliction, riparian rights, or change of condition as affecting title." *Hilt* at 216. Indeed, the term "high water mark" does not even appear in the decision.

[20] Amicus Tip of the Mitt criticizes this characterization. *See* Tip of the Mitt Brief, p 20. In his article, Professor Steinberg so identified the doctrine. Steinberg at 71. This Court in *Kavanaugh* v *Baird*, 241 Mich at 243, referred to the "so-called 'Trust Doctrine.'" The phrase "public trust doctrine" did not make its way to any reported decision of the Michigan courts until 1969. Moreover, "there is really no single 'Public Trust Doctrine.' Rather, there are over fifty different applications of the doctrine...." Putting the Public Trust Doctrine To Work, 2d edition (Coastal States Organization 1997). Our

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Bay Harbor Co v *City of Monroe*, *supra*, which decision noted that "the proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake (emphasis added)." *Hilt* at 208. The Court also noted the reference to the doctrine in several other cases. *Id.* Finally, the *Hilt* Court acknowledged heated and vigorous arguments, presumably those made by the state Department of Conservation and others by way of amicus briefs, that the trust doctrine should not end at the water's edge, but should extend upward across the dry shore. *Hilt* at 224. The *Hilt* Court clearly and unequivocally rejected this extension of the public trust doctrine for "public control of the lake shores":

> With much vigor and some temperature, the loss to the state of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest.

Hilt at 224. The Court went on to point out that even under the *Kavanaugh* cases, the alleged title to the meander line was merely that of trustee under the trust doctrine: "only for the preservation of the public rights of navigation, fishing, and hunting." *Id.* at 224. So when the *Hilt* Court opined that the state's title ended at the water's edge, it was speaking in terms of that title which is held in public trust. If there is any question from the words used by the majority opinion, it was clarified by this statement from the dissent:

> My brother's opinion is far reaching, for it constitutes the Michigan shoreline of 1624 miles private property, and thus destroys for all time the trust vested in the State of Michigan for the use and benefit of its citizens.

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characterization is intended to highlight that, whatever the name, the doctrine has been consistently considered by the courts virtually since the creation of the state's judiciary.

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Id. at 231. Of course, the majority's decision indicated that no trust in Michigan shorelands was destroyed by its decision, because it never existed there in the first place, but instead ended at the water's edge. In any event, it is clear from *Hilt* that no public trust extended beyond the water's edge and onto the dry lakeshore. This is consistent with *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923), which the *Hilt* Court cited with approval.[21]

C. The Term "Water's Edge," As Used by the Court, Is Not Vague, But Has a Plain Meaning.

Amicus Tip of the Mitt argues that the term "water's edge" is an imprecise term. *See* Brief of Tip of the Mitt, p 8. Yet under the facts and given the analysis in *Hilt*, the Court could not have spoken more clearly. Further, this Court should consider the context of the *Hilt* decision. During briefing in that case, the Legislature passed on May 7, 1929, after a 24-1 vote in the Senate, a bill intended to overrule the *Kavanaugh* cases. The bill was "to establish the water's edge as from time to time existing as the boundaries instead of the meander line" on Michigan's Great Lakes shores. *See* 1929 SB 316 (Appendix 6). Despite its overwhelming legislative support, the bill was not signed by the Governor, whose Department of Conservation had been busily surveying the new lands granted by the *Kavanaugh* cases,[22] and which probably had a role in the Attorney General's opposition to overruling the *Kavanaugh* cases. The *Hilt* Court was no doubt aware of this legislative attempt to fix the problem when it re-established the water's edge as the boundary and did so using the term "water's edge."

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[21] The *Doemel* Court held: "so that during periods of high water the riparian ownership represents a qualified title, subject to an easement [for public trust rights] while during periods of low water it ripens into an absolute ownership as against all the world, with the exception of the public rights of navigation . . ." *Id.* at 398.

[22] Steinberg at 78, *supra.*

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D. Attempts to Distinguish Hilt and Its Use of the Term "Reliction" are Unpersuasive.

Adjudicating a dispute involving land uncovered by near record low water levels, the *Hilt* v *Weber* majority squarely characterized the case as one involving the "rule of reliction," holding that the riparian owner was the fee owner of relicted land. *Id.* at 220. Seventy-four years after that decision, citing no subsequent case, disregarding the plain and unambiguous language used by the *Hilt* Court, and ignoring further elaboration by this Court in subsequent cases, Plaintiff and Amicus Tip of the Mitt now assert that by using the term "reliction," the Court intended some type of "permanent" recession of the water, without offering to explain the type of "permanence" to which the Court might have been referring. *See* Plaintiff's Brief, p 21; Tip of the Mitt Brief, pp 8-9. The assertion belies both the facts and the law as explained by *Hilt*.

While not mentioning the near record low water levels at work in the case, the *Hilt* Court did seem to note that the reliction in question had occurred only since Michigan's admission to the Union, a mere 93 years earlier:

> While some of the disputed strip undoubtedly has always been upland since before admission of the State into the Union, and the rest has been made dry land partly by accession and partly by reliction, the whole will be referred to as relicted land . . . Nor are we concerned with the specific cause of the reliction or accession so it be gradual, imperceptible, and natural or general to the lake (emphasis added).

Id. at 201. Plaintiff offers no facts, no explanation, and no citation to the record or otherwise, that would cause the *Hilt* Court to conclude that the natural or general "reliction" that occurred in *Hilt* was somehow permanent, never to return, and that in a brief period of 93 years since the state was admitted to the Union and acquired the lakebottom from the federal government, it knew it to be so.

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The idea that the term "reliction," as that term was employed by the Court,[23] necessarily means some type of permanent lowering of water also belies the *Hilt* Court's tossing the term into the same pot as other types of constant, as opposed to permanent, change:

> The most ordinary effect of a large body of water is to change the shoreline by deposits or erosion gradually and imperceptibly....

Id. at 219. Similar to such deposits and erosion, perhaps the "most ordinary effect of the Great Lakes" is to change water levels gradually and imperceptibly. *Id. Hilt* was not concerned with the cause of "reliction" that was "gradual, imperceptible, and natural or general to the lake." *Id.* at 201.

The *Hilt* Court also introduces a new term not before mentioned in the earlier cases: "accession." *Hilt* at 201. The term refers to "all that is added to the property (esp. land) naturally or by labor." Black's Law Dictionary (West 2004). Such additions need not be "permanent."

Further evidence of the Court's usage of the term "reliction" is found in the interplay between the opinion and the concurrence of Justice Potter. With the subject dominating his concurrence, Potter seemed to write separately to express his disagreement with the majority on the meaning of reliction:

> The doctrine of reliction has no application to lands temporarily laid bare by a recession in the water due to variation in the amount of evaporation and precipitation, nor the lands laid bare by a recession of the water due to diversion or drainage (emphasis added).

Id. at 228. Justice Potter cited no authority for his conclusions, as his concurrence contained not a single citation. In contrast, as quoted above, the majority was not "concerned with the specific

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[23] Plaintiff points to authorities addressing rivers which appear to define or employ the term "reliction" as a permanent lowering of water levels, arguing that since the *Hilt* Court used that term, it could have only intended the term to have the same meaning. *See* Plaintiff's Brief, p 22. Plaintiff has wholly failed to address the arguments herein. Moreover, the Great Lakes are not rivers, and have substantially different hydrological characteristics.

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cause of the reliction," so long as it was "natural or general to the lake (emphasis added)." *Id.* at 201. "Evaporation and precipitation" are natural; diversion or drainage would be general. Had the majority agreed with Justice Potter's conclusions, they could have easily incorporated some or all of his ten sentence concurrence into their decision.

The *Hilt* Court's intended meaning of "reliction" is revealed by its citation to *Brundage* v *Knox*, 279 Ill 450; 117 NE 123 (1917). *See Hilt* at 220. Characterized by the *Hilt* case as one involving the "rule of reliction," *Brundage* involved the recession of water on Lake Michigan, and the riparian owner's actions in building structures to protect the shoreline, which the state asserted was unlawful. Evidence in that case showed that the water had receded between 1890 and 1915, but that it had at various times come up to destroy a fence earlier built to the water's edge. Like Plaintiff in the case at bar, the state's attorney general argued that the riparian's title extended only to the "ordinary high water mark of Lake Michigan." *Id.* at 470. The Illinois Supreme Court disagreed, and after considerable analysis concluded:

> The decree of the circuit court rightly fixed appellee's easterly boundary as the edge of Lake Michigan when free from disturbing causes.

Id. at 473. So in announcing its rule of reliction, the *Hilt* Court chose to cite a case which specifically rejected the ordinary high water mark as the riparian boundary, and set it at the edge of the water.

Further clarifying the point, the Court referred to the application of the "rule of reliction" in *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923). That case involved the very issue presented at bar, as urged by Plaintiff:

> [T]he defendant and the state contend that the plaintiff's title stops at the ordinary high water mark, and that the title of the land constituting the shore between such ordinary high and low water marks is held in trust for the benefit of the public . . . [including] the purposes of public travel and public purposes generally.

Id. at 394. The Court conceded:

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> It is true, as contended by counsel who have appeared as amici curiae, that it is unfortunate in one sense that this court, in treating of the boundaries of the riparian owner, has used a variety of expressions, such as "water's edge," "natural shore," "waterline," "ordinary low-water mark," and "ordinary high water mark."

Id. at 397. Still, the Court noted that a "careful reading of all these cases will disclose but very little conflict, from the standpoint of principle, with respect to the issue involved, and when the principles are applied to the facts in each particular case." *Id.*

The Court then observed the "natural order of things":

> During certain periods of the year when precipitation is large, and when the waters of the lakes are swelled by the increasing in-flowing volumes coming from springs, rivers, creeks, and the flowage of surface water and the precipitation in the form of rain, the lake exercises its dominion over the land to the high-water mark. This dominion, however, is not permanent. Upon the seashore, where the waters are affected by the tide, it is intermittent. As to inland lakes and rivers, such assertion of dominion on the part of nature is periodical (emphasis added).

Id. at 398. In the shadow of ostensibly conflicting Wisconsin decisions, the *Doemel* Court bravely concluded:

> So that it would appear but logical to hold that, when nature in pursuance to natural laws holds in its power portions of the land which at periods of the year are free from flowage, then during such periods the strip referred to is subject to all the rights of the public for navigation purposes. On the other hand, when the waters recede, these rights are succeeded by the exclusive rights of the riparian owner. So that during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute ownership as against all the world, with the exception of the public rights of navigation and with those rights no interference will be tolerated where the acts affect or have a tendency to affect the public rights for navigation purposes (emphasis added).

Id.[24]

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[24] Notably, and akin to the *Hilt* decision, the *Doemel* Court felt compelled to this conclusion based on the early development of the law in Wisconsin:

> If the rights of riparian owners had not attached or been declared by the courts, a different situation would be presented. Early in the history of this State this court, in harmony with other courts, has firmly declared that the title of a riparian owner on a navigable inland meandered lake extends to low-water mark. In the early period of our history the lands surrounding these lakes were the property of the state. From time to time the state made grants to private individuals of lands abutting upon the inland waters, and it might be said that by far the greater portion of these grants were executed subsequent to the solemn declaration of the rights of riparian owners by this court. These rights were always considered valuable, and, as a result of

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Citing it no less than three times, the *Hilt* decision fully adopts the reasoning of the *Doemel* Court which, like *Hilt* and *Brundage*, has never been criticized or called into question by any reported decision.[25] Like it characterized the *Brundage* decision, the *Hilt* Court referred to *Doemel* as one involving the "rule of reliction."

Curiously, Plaintiff directs this Court to *Nedtweg* v *Wallace*, 237 Mich 14; 211 NW 647 (1926) for the proposition that this Court limits its interpretation of the word "reliction" to a permanent recession of water. *See* Plaintiff's Brief, pp 21-22. Quite the contrary, in *Nedtweg*, this Court acknowledged the word was capable of two meanings: "the restricted sense of land uncovered by a recession of water," and "the broader sense of former lake bed unfitted by recession of water and accretion for purposes of navigation, hunting, and fishing, and therefore rendered suitable for human occupation." *Id.* The Court then distinguished between the "permanent recession of waters" and "reliction":

> Beds of the Great Lakes, involving no riparian or littoral rights, unfitted for navigation, hunting, or fishing by permanent recession of waters, reliction, accretion, or alluvion, and useful for residence purposes with or without dredging, may be leased by the state in its proprietary capacity under legislative authorization (emphasis added).[26]

Finally, the parties in *Hilt* used the term "reliction" as including the periodic lowering of water levels. For example, after conceding that "other states have adopted the rule that the

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> such declarations, the doctrines pertaining to riparian rights have become fixed rules of property. Whatever may be our individual inclinations or desires or our views as to property or the public welfare, we cannot disturb the interests which have so become vested. *Id.*

[25] Amicus Tip of the Mitt points out at pp 10-11 of its Brief that *Doemel* was not a Great Lakes case. That is true, but the amicus ignores the point made by Amici SOS and IGLC: that the *Hilt* Court's use of *Doemel* demonstrates the clear meaning of the Court's decision in laying title at the water's edge.

[26] Recall that in authorizing the state to lease relicted lands, the *Nedtweg* Court was working under the precedent of *Kavanaugh* v *Rabior*, *supra*, which had erroneously held that all land below the meander line belonged to the state.

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riparian owner's title extends to the water's edge at normal level," the Michigan Attorney General noted:

> This rule followed by some of the other states results in a shifting ownership back and forth between the upland owner and the state. But it results in the upland owner being the riparian owner at all times, regardless of either reliction or high water levels. It may result, however, in the riparian owner losing entirely the control of his property by the rising of the water so as to cover the land.

Brief of Attorney General Acting as Amicus Curiae, p 22 (Appendix 5). As a result, the proposition that the *Hilt* Court's use of the term did not include variations in water level from time to time, as observed by the *Doemel* Court, is untenable.

E. *Hilt* v *Weber* Remains the Law in Michigan, and Subsequent Cases Have Further Clarified Its Holding of Riparian Ownership to the Water's Edge.

A number of decisions issued since *Hilt* have confirmed its holding of ownership to the water's edge, and the decision continues to represent the law in Michigan. *See*, eg, *Kavanaugh* v *Baird (On Rehearing)*, 253 Mich 631; 235 NW 871 (1931); *Staub* v *Tripp*, *supra*; *Donahue* v *Russell*, *supra*; *Klais* v *Danowski*, *supra*; *Boekeloo* v *Kuschinski*, 117 Mich App 619; 324 NW2d 104 (1982); and *Peterman* v *DNR*, *supra*. Moreover, these decisions interpret *Hilt* consistent with the position of amicus herein and contrary to the position espoused by Plaintiff and her supporting amicus parties.

For example, promptly after *Hilt*, the Court again reviewed *Kavanaugh* v *Baird*, *supra*, reversing its former decision. *Kavanaugh* v *Baird*, 253 Mich 631. Recall that in *Kavanaugh*, the land at issue, described as relicted land, was due to "recent low waters," the Court recognizing that "the waters of the Great Lakes rise and fall over a cycle of years." *Kavanaugh*, 241 Mich at 251, 252. The decision—which "fixes the title to the land in question in the state in trust for its people"—was reversed, and against the State of Michigan, the riparian owner was "entitled to a decree quieting the title in him to the relicted land involved." *Id.* Any criticism that *Hilt* did not involve land revealed by cyclical low water; that the justices did not fully appreciate the cyclical

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nature of the Great Lakes; that the holding of ownership to the water's edge was *dictum*; or that the state was not a party and is therefore not bound thereby, is rebuffed by the direct reversal of *Kavanaugh* v *Baird.*

More than three decades later, this Court addressed the issue of Great Lakes boundaries once again in *Klais* v *Danowski*, 373 Mich 262. After citing *Hilt*, and after recognizing records dating back to 1860 showing "a high degree of fluctuation in the water levels," this Court in *Klais* specifically employed the term "reliction" to describe the temporary recession of water after "periods of high water level":

> Where, during a period of high water level and inundation of lands of the private claim, conveyance is made of all or some portion thereof by description stating that it runs to the lake, it must be held to mean, unless a contrary intent is clearly expressed, that it extends at least to the border of the lake as of the date of the patent, and, by reason of riparian rights and the consequent right to accretions, beyond if and when accretions or reliction cause the border of the lake to recede further lakeward (emphasis added).

Id. at 423.

Most notably, the *Hilt* decision was upheld and followed by this Court 64 years later in *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994). In that case, beachowners sued the Michigan Department of Natural Resources ("DNR") for compensation due to the destruction of their beach caused by the DNR's negligently installed boat launch and jetties. Citing *Hilt* v *Weber*, this Court held that the state must compensate the riparian owner for its negligent destruction and the resulting "loss of the beach below the ordinary high water mark." *Peterman* at 200-202. In its decision, the *Peterman* Court specifically referenced with approval the *Hilt* Court's conclusion that "the riparian owner has the exclusive use of the bank and shore," holding that the property below the ordinary high water mark was "plaintiff's beach." *Peterman*, 446 Mich at 192, 201, citing *Hilt*, *supra*, at 226. And like the *Hilt* decision, the *Peterman* Court, 64 years later, repeated the *Hilt* Court's recognition of the benefits of "public control of the lake

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shores," but quoted again its conclusion that the state has no power "which will justify it in taking private property without compensation." *Peterman*, 446 Mich at 193.[27] While one justice dissented in part, arguing that the beach below the ordinary high water mark "is held by the state in trust for the people," the Court found that it was "plaintiff's beach," and affirmed an award "for the loss of plaintiff's property." *Id.* at 201-202. Thus, the argument that the state's fee under the public trust doctrine extends beyond the actual water's edge has been specifically rejected by this Court in 1930 by *Hilt*; in 1931 by *Kavanaugh*; and by *Peterman* in 1994. These cases remain the law in Michigan without criticism by any reported decision.

F. The Court of Appeals, While Reaching the Right Result, Critically Erred in its Analysis.

In an otherwise well-written and persuasive decision, the Court of Appeals in this case critically erred in asserting that the state owned title in fee up to the so-called "ordinary high water mark":

> Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine.

(Opinion, p 9). *See also* page 7 of the opinion:

> Although the state holds title to land previously submerged, the state's title is subject to the riparian owner's exclusive use, except as it pertains to navigational issues.

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[27] The *Peterman* Court did state that "riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation," but that discussion was *dictum* under the Court's holding; it was provided despite no briefing on the issue of riparian rights; and in any event offers no consolation to plaintiff in this case. *Peterman* at 193-198; *see also* the briefs therein. *See also Hilt* at 225, 226 ("Riparian rights are property, for the taking or destruction of which by the State compensation must be made, unless the use has a real and substantial relation to paramount trust purpose . . . The only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation.") As explained in *Sterling* v *Jackson*, *supra*, the public right of navigation on the Great Lakes excludes any use of the soil, and is to be distinguished from the State's rights under the public trust doctrine. *Id.*, 69 Mich at 497. Mrs. Glass does not navigate on defendant's beach, and has no right to any use of the soil thereon. Amicus Tip of the Mitt erroneously conflates the "navigational servitude," which is limited to rights of navigation, and the "public trust," a very different legal concept. Tip of the Mitt Brief, pp 17-18.

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These statements, as they relate to title, are not, and never have been, the law in Michigan.[28] Moreover, the conclusion is set forth without substantial analysis, and without credible citation of authority. In the first assertion, the Court of Appeals refers us only to *Hilt*, *supra*, at 226. The cited page, which also is cited in an erroneous 1978 Attorney General opinion discussed *infra*, contains no such conclusion by the *Hilt* Court, as more thoroughly set forth in Argument II, *infra*. The *Hilt* decision offers no support for the assertion of the Court of Appeals referenced above.

For the second assertion of the Court of Appeals quoted above, the Court cites the *Peterman* case at page 195. Again, this page from *Peterman* contains nothing to support the assertion made. Quite to the contrary, the *Peterman* Court characterized the property below the ordinary high water mark as that of the riparian:

> In other words, riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation.

Id. at 195. The issue in *Peterman* was the loss of sand from the "loss of the beach below the ordinary high water mark." *Id.* That beach was "plaintiff's beach." *Id.* at 208. The assertion that *Peterman* supports a holding of state title to dry land above the water is clearly and unambiguously wrong, and the Court of Appeals' mistaken assertions of state title above the water's edge should be corrected by this Court.

G. As a Rule of Property Law, Hilt Should Not Be Overturned.

Even if modern courts could find fault with the *Hilt* decision, the decision should nevertheless stand. This Court has held that "stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce reliance." *Bott* v *Commission of Natural*

[28] They do, however, mirror the flawed reasoning of a 1978 opinion of the Attorney General. *See* OAG 1977-1978, No 5327 (July 6, 1978) and discussion in Argument II, *infra*.

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Resources, 415 Mich 45, 77; 327 NW2d 838, 849 (1982), citing *Lewis* v *Sheldon*, 103 Mich 102; 61 NW 269 (1894); *Hilt* v *Weber*, *supra*. Urged in 1982 to extend public rights of use to a creek by modifying the definition of navigability, the Michigan Supreme Court in *Bott*, *supra*, refused:

> The rules of property law which it is proposed to change have been fully established for over 60 years, and the underlying concepts for over 125 years. Riparian and littoral land has been purchased in reliance on these rules of law, and expenditures have been made to improve such land in the expectation, based on decisions of this Court, that the public has no right to use waters not accessible by ship or wide or deep enough for log flotation, and that, even if there is navigable access to a small inland dead end lake, the public may not enter over the objection of the owner of the surrounding land, and that the only recreational use recognized by this Court as an incident of the navigational servitude is fishing. The Legislature can, if it is thought to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public in those parts of the state where the Legislature finds that there is a shortage of public access to inland rivers and lakes and for the compensation of landowners affected by the enlarged servitude (emphasis added).

The Court further stated:

> The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. The judiciary must accept responsibility for its actions. Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital . . . It cannot be denied that some landowners have invested their savings or wealth in reliance on a long-established definition of navigability. It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value. Vacationers are not manufacturers who can pass on their losses to a large class of consumers. Techniques to safeguard past reliance on prior law such as prospective overruling are unavailable where property rights are extinguished. Prevention of this hardship could be avoided through compensation, but this Court has no thought of providing compensation to riparian or littoral owners for the enlarged servitude and the resulting reduction in amenities and economic loss.

Id. at 77.[29] Since the *La Plaisance* decision in 1843, confirmed by *Silberwood*, *supra*, *Warner*, *supra*, *Hilt*, *supra*, and *Peterman*, *supra*, riparian owners have relied on the rule of property law established, developing the lakeshores as the *Hilt* Court intended, and under the foregoing authority, the rule should stand.

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[29] Plaintiff incorrectly asserts that in *Bott*, the log flotation test "was abandoned in favor of the recreational boat test to reflect the changing needs of the public." Plaintiff's Brief, p 18. This, of course, is the opposite of what occurred in *Bott*.

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II. THE GREAT LAKES SUBMERGED LANDS ACT DOES NOT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE.

A. Introduction.

Plaintiff and her supporting amici[30] assert that the Great Lakes Submerged Lands Act ("GLSLA"), now compiled at MCL 324.32501 *et seq.*, set the boundary between state owned bottomland and the riparian at a statutorily designated "ordinary high water mark" of 579.8 feet above sea level for Lake Huron. This position is also vigorously espoused by the State of Michigan's Department of Environmental Quality and the Department of Natural Resources ("DNR"), both of which have curiously elected not to support their position before this Court.[31] Rejected by less biased observers such as the Land Title Standards Committee of the State Bar (*see* Argument I(A), *supra*), the position of these proponents cannot withstand scrutiny.

B. Under its Plain and Unambiguous Meaning, the GLSLA Does Not Establish a Fixed Boundary Between the State and Riparians.

To determine the meaning of the GLSLA, this Court first looks to its language, and if it is plain and unambiguous, no further inquiry is warranted. *Stanton* v *City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). The statute at issue provides as follows:

> Sec. 32502. The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will

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[30] *See* Plaintiff's Brief, p 38; Amicus Tip of the Mitt Brief, p 20; Amicus National Wildlife Federation Brief, p 5.

[31] Although these departments, aware of this litigation, have chosen not to participate, it is notable that Tip of the Mitt Watershed Council receives hundreds of thousands of dollars from one or both of these departments each year. Moreover, its counsel, Cooley Professsor Shafer, previously served as Chief of the Shorelands Division of the DNR.

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> not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet (emphasis added).

According to the statute's terms, it applies (1) only to lands "in the Great Lakes...belonging to the state or held in trust by it...." In *Oliphant* v *Frazho*, 5 Mich App 319; 146 NW2d 685 (1966), *rev'd on other grounds Oliphant* v *State*, 381 Mich 630; 167 NW2d 280 (1969), the Court of Appeals so limited the statute's application, finding that the Act did not apply to patented lands not owned by the state. Having limited the term "lands" to those owned or held in trust by the state, the statute further limits the term "the aforesaid described" lands to those lands (2) "lying below and lakeward of the natural ordinary high water mark." A third limitation of the application of the Act excepts (3) certain "property rights" from the Act, including those "acquired by accretions occurring through natural means or reliction." Finally, the Act defines the ordinary high water mark in terms of elevation, and limits that definition to "purposes of this part." Thus, the Act contains four important limitations of application as it relates to this case.

Because the Act applies only to lands "belonging to the state or held in trust by it," it cannot apply to Defendants' beach above the naturally occurring water's edge, which we know from *Hilt* and its progeny is owned by the riparian.[32] Moreover, the Act does not affect "property rights secured by...reliction." As set forth in Argument I(D) above, relicted land includes land uncovered during periods of low water, as it was in

[32] Even if the navigational servitude referred to in *Peterman, supra*, somehow extends beyond the water's edge in times of low water, the servitude does not represent a fee, whether burdened by a trust or not.

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Kavanaugh v *Baird*, *supra*, and other decisions of this Court. Rather, the Act "specifically preserves those riparian rights set forth in *Hilt* and its progeny." Court of Appeals opinion, p 10. In adopting the GLSLA, "the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation* v *WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This includes the Legislature's use of words which have been defined by the courts. *Kirkley* v *General Baking Co*, 217 Mich 307; 186 NW 482 (1922). The Legislature therefore did not alter the meaning of "reliction" as that term was used by *Hilt*. Under the plain language of the GLSLA, the Act does not apply to Defendants' beach above the water's edge.

Neither Plaintiff nor her supporting amici attempt to rebut the argument set forth above—that the statute's applicability rests on a determination of ownership separate and apart from the statute. Plaintiff concentrates her analysis not on ownership, but on public rights, while Amicus Tip of the Mitt skips an analysis of the statutory language, and launches into its view of legislative history. Amicus National Wildlife Federation merely cites the portions of the statute referring to the ordinary high water mark, omitting the portions which require ownership by the state (thus misleading the reader), illogically concluding that the Legislature set the boundary therein.[33] None of these arguments is tenable. Since the statute unambiguously requires a finding of state ownership prior to application of the Act, further analysis along the lines suggested by Plaintiff and her amici is neither required nor allowed.

C. Adopting Plaintiff's Interpretation of the GLSLA Would Render the Statute Unconstitutional.

The *Hilt* Court's holding of ownership to the water's edge established a rule of property, the modification of which requires compensation to the owners thereof. *Hilt*, 232 Mich at 224;

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Bott, 415 Mich at 77; *Peterman*, 446 Mich at 193. The Great Lakes Submerged Lands Act makes no provision for compensating riparian owners, and an interpretation that the statute sets the boundary not at the water's edge, but at the ordinary high water mark, would therefore render the statute unconstitutional and void. *Thayer* v *Michigan Department of Agriculture*, 323 Mich 403; 35 NW2d 360 (1949).

Courts favor a statutory interpretation which would be consistent with the Constitution. *People* v *Gilliam*, 108 Mich App 695; 310 NW2d 834 (1981). Neither Plaintiff nor her supporting amici explain how the Legislature could change the boundary from the water's edge to the ordinary high water mark without violating the Constitution. To its credit, the Legislature did not so intend.

D. Even if the GLSLA Was Ambiguous, the Legislative History Refutes Plaintiff's Position.

In considering Plaintiff's claim that the GLSLA granted her rights to walk on Defendants' beach, the Court of Appeals properly looked to "the unambiguous language of this statute." Court of Appeals opinion, p 10, citing *Charter Township of Northville* v *Northville Public Schools*, 469 Mich 285, 290; 666 NW2d 213 (2003). Both Plaintiff and Amicus Tip of the Mitt fail to point out any ambiguity in the statute itself, and simply launch into considerations of legislative history. Plaintiff's Brief, pp 37-38; Tip of the Mitt Brief, pp 12-18. While Plaintiff and amici are free to do so, this Court does not. *In re Certified Question from the US Court of Appeals For Sixth Circuit*, 468 Mich 109; 659 NW2d 597 (2003). Moreover, even if the GLSLA was ambiguous, the statute's legislative history does not support the ordinary high water mark boundary theory, as explained below.

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[33] *See* Plaintiff's Brief, pp 35-39; Brief of Tip of the Mitt, pp 12-20; Brief of National Wildlife Federation, pp 4-5.

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(1) For Over 50 Years, the GLSLA and Its Predecessors Authorized the Leasing of Trust Lands to Riparians.

Contrary to the statements of some commentators, the Great Lakes Submerged Lands Act of 1955 was not new. In 1913, just three years after this Court in *State* v *Venice of America Land Co*, *supra*, held that hundreds of acres of land forming part of Harsens Island was state land, subject to the trust doctrine, the Legislature passed 1913 PA 326, CL 1915 §606 *et seq.* (*See* Appendix 7) The stated purpose of the Act was "to provide for the leasing, control and taxation of certain lands owned and controlled by the state." *Id.* The statute provided:

> All of the unpatented overflowed lands, made lands and lake bottomlands belonging to the State of Michigan or held in trust by it, shall be held, leased and controlled by the State Board of Control (emphasis added).

Id.; *see also Nedtweg* v *Wallace*, 237 Mich at 18. The Act was remedial, its provisions benefiting those who had applied for leases under previous acts in 1899 or 1909, and those "in occupancy of any land under the definition set forth herein prior to January one, nineteen hundred thirteen [1913]." 1913 PA 326, §13, 14.

In 1955, another legislative remedy was deemed necessary. The GLSLA was a legislative response to the State Department of Conservation's efforts, including 15 lawsuits in 1955 for injunction and a possible class action suit, to remove hundreds of persons who had, once again, filled in shallow-water areas along Lake St. Clair. Haller, *Michigan's Purloined Shorelines*, 34 Mich St B J, 36 (May 1955) (*See* Appendix 8).[34] *See also* Brief of Tip of the Mitt,

[34] Amicus Tip of the Mitt asserts, without citation of authority, that the Great Lakes Submerged Lands Act was "enacted in response to the federal Submerged Lands Act...," and that the federal law "used the ordinary high water mark as the boundary line for state bottomlands." Tip of the Mitt Brief, p 12. Amicus herein is unaware of any legislative history linking the two acts, and the connection is not mentioned in Haller's article. Further, such a proposition is unlikely, since the 1955 Act was akin to the 1913 Act. Finally, the assertion that the federal law "used the ordinary high water mark as the boundary line for state bottomlands" is simply false, and the presentation of amicus is misleading. The statute cited in fact reads:

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p 13. By passage of the Act, the Legislature intended to curtail the Department of Conservation, and to "get these people off the hook." *Id.* The Legislature did this by once again authorizing state grants of title to filled-in shallow water areas which the Department of Conservation claimed as state public trust lands. Like the 1913 Act, the purpose of the GLSLA was logically limited to lands owned by the state:

> An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it; to provide for the disposition of revenue derived therefrom; and to appropriate funds for the administration of the provisions of this act (emphasis added).

See 1955 PA 247 (Appendix 9).[35]

Like the 1913 Act, the GLSLA of 1955 applied to lands "belonging to the state of Michigan or held in trust by it," but only those lands "which have heretofore been artificially

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> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof (emphasis added).

43 USC §1311. Thus, because under Michigan law riparians own to the water's edge, the federal Submerged Lands Act confirms title above the water's edge in the riparian up to the ordinary high water mark. The Act "creates no new rights for the states," and "is not a grant of title to land, but only a quitclaim of federal proprietary rights in the beds of navigable waterways." *Bonnelli Cattle Co* v *Arizona*, 414 US 313; 94 S Ct 517; 38 L Ed 2d 526 (1973).

[35] As this Court knows, Const 1963, art 4, §24 provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

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filled in and developed with valuable improvements." *Id.*, §2. Applications were to be "filed within 3 years from the effective date" of the Act. *Id.*, §4(b). Thus, owners had a small window to secure legal rights to their realty improvements, a window that was extended indefinitely when the Legislature amended the Act in 1958. *See* 1958 PA 94, §(4)(b) (Appendix 10). While providing a remedy for past sins, the 1958 Act made future filling and dredging on state lands a criminal offense, presumably in exchange for extending the Act's window indefinitely. The Act's title was shortened. Nothing in the Act suggested that it defined a boundary.

(2) Efforts to Amend the GLSLA to Define The Ordinary High Water Mark as a Boundary Failed.

The 1960's saw the Department of Conservation participate in an aggressive—but ultimately unsuccessful—campaign to establish the ordinary high water mark as a legal boundary between riparians and the state. That campaign offered a revisionist interpretation of *Hilt* v *Weber*, *supra*, and efforts to amend the GLSLA, consistent with its views. Because the Department has caused its interpretation of the law to be well publicized, it has caused great confusion among the public, commentators, and the courts, including the Court of Appeals in this case. As a result, a studied analysis of the development of the Department of Conservation's position is warranted.

(a) State Departments Acknowledged Hilt's Holding of Riparian Title to the Water's Edge.

For thirty years after the Department suffered defeats in both *Hilt* and the subsequent reversal of *Kavanaugh* v *Baird*, *supra*, the state's position on riparian ownership was fairly consistent. With the *Kavanaugh* cases, the attempted legislative correction, and the 1930 *Hilt*

This constitutional provision was "designed to prevent the Legislature from passing laws not fully understood . . ." 22 Michigan Civ Jur, Statutes, §22. *See also Pohutski* v *City of Allen Park*, 465 Mich 675, 691; 641 NW2d 219 (2002).

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decision still within recent memory, Michigan's Attorney General issued a contemporary opinion acknowledging the holding which the Department argued against three years earlier:

> At the outset, I wish to advise you that the general rule as set forth in 23 ALR 778 prevails, which is as follows: ". . . the true rule should be that the riparian title (on the Great Lakes) goes to the water at whatever stage, the shore being subject to the public use when it becomes covered with water. This preserves the rights of both public and riparian owners, and avoids the conflicts which otherwise must necessarily arise." The foregoing mentioned rule is the general law that does prevail. All states bordering the Great Lakes have now adopted the theory that the riparian owners along the Great Lakes own to the water's edge . . .

OAG, 1932-34, p 287 (July 13, 1933).

Eleven years later, the Attorney General opined on whether the state had authority to grant an oil and gas extraction lease to presently submerged land along a Great Lakes shoreline. The Attorney General cautioned that because "lands formerly submerged . . . would become by reliction lands owned and controlled by the riparian owner," the "consent of the riparian owner should be obtained." OAG No 0-2249 (May 12, 1944). The Attorney General so held despite that it was "conceivable that the lands thus obtained by reliction could again become owned by the state in trust by again becoming submerged." *Id.*[36]

The then-acquiescent interpretations of both *Hilt* and the GLSLA by the Department of Conservation were revealed in *People* v *Broedell*, 365 Mich 201; 112 NW2d 517 (1961), where this Court noted that the Department followed the "philosophy" of *Hilt* v *Weber* "that the dividing line between the state's and the riparian owner's land follows the water's edge or shoreline at whatever level it may happen to be from time to time." *Id.* at 206. That decision quoted, but did not do justice to, the actual testimony of Charles E. Millar, Chief of the Lands

[36] But *see* OAG No O-3984, p 506 (October 25, 1945). In determining that a riparian could not erect a channel and dike on submerged lands that at times is part of the dry shore, the Attorney General states that *Hilt* "does not cover land temporarily made bare by periodic fluctuations in the level of the water, but only land made bare by gradual imperceptible accession or recession of the water." *Id.*

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Division, Department of Conservation, which was not philosophical, but was clear and unequivocal:

> It is my understanding that the state has absolute title to the land submerged from the water's edge of the lake, lakeward, and that the land owner has title to the upland down to the water's edge, wherever it may be. It is a fluctuating boundary between the upland owner and the State of Michigan. It is my understanding also that the upland owner's title is a qualified title below what would be determined to be the high water mark.

Broedell Appellant's Appendix, p 105b (*see* Appendix 11).

(b) The State Offers a Revisionist Interpretation for *Hilt* v *Weber* Based on a Faulty Reading of the Decision.

Unfortunately, the state's resultant acceptance of the result in *Hilt* did not last. Just two months after the *Broedell* decision suggested in *dictum* that the law as to boundary was open to question, 1962 HB 548 would have amended the GLSLA by confirming riparian title at the water's edge, but granting the state an easement to the ordinary high water mark. (*See* Appendix 12). When hearings on the bill revealed criticism of the establishment of an ordinary high water mark, the Department responded with a four page legal memorandum to legislators dated March 9, 1962. (*See* Appendix 13). That memorandum referred to *Hilt* as the "outstanding" case on the issue, but like Plaintiff and her amici herein, the memo argued that the Court failed to "take cognizance of the fact that the levels of the waters of Lake Huron[37] . . . rise or fall to some degree, from time to time." *Id.*, p 1. Disregarding the first 24 pages of the *Hilt* Court's carefully crafted decision, the memorandum concludes that the ordinary high water mark separates the public trust from riparian lands. To support its analysis, the memorandum first extracts out of context the following language from the Court's lengthy discussion at page 226:

> The riparian owner has the exclusive use of the bank and shore and may erect bathing houses and structures thereon for his business or pleasure (45 C J p.505;

[37] At least portions of the memorandum were revised to change the reference from Lake Huron to Lake Michigan.

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> 22 L R A [N S] 345; *Town of Orange* v *Resnick, supra)*, although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the state (*Thiesen* v *Railway Co*, 75 Fla 28 [78 South 491 L R A 1918E, 718 (1917)] And it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the state. *Doemel* v *Jantz, supra.*

Id.

A careful study of both the *Doemel* decision and the *Hilt* Court's reference to it reveals the error in reading the above language out of context. For twenty-four pages, the *Hilt* Court discusses its legal analysis, concluding that riparians own to the water's edge. Beginning at the bottom of page 224, the *Hilt* v *Weber* decision attempts to allay the concerns of public rights advocates:

> Perhaps, also, some of the apprehension of the extent of the injury to the state and its citizens [from lack of "public control of the lake shores"] would be allayed if the scope of the *Kavanaugh* decisions were not so misunderstood and misrepresented.

Hilt, 252 Mich at 224. The Court then embarked upon a demonstration that, in view of the *Kavanaugh* holdings that the upland owner has riparian rights, the difference between those cases and the *Hilt* decision of riparian ownership to the water's edge was, as a practical matter, "negligible." *Id.* at 225. This was because of the doctrine of riparian rights, most of which are "included the general right of access, which is quite broad." *Id.* at 226.

It was in listing those broad riparian rights that the Court referred to the riparian's right to exclude the public, "although title is in the state." *Id.* at 226. By this quote, the *Hilt* Court was demonstrating that even if title was in the state, as the *Kavanaugh* cases had held (but which the *Hilt* decision denied), the riparian could exclude the public, among his other rights. This was the same analysis as the *Doemel* Court went through prior to concluding in favor of ownership to the water's edge:

> [W]hether the title to the shore between ordinary high and low water marks be deemed in the public, or whether it rests in private ownership, the rights of the

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> riparian owner are equally well fixed and established, and any invasion of such rights on the part of a stranger necessarily works an injury to the rights of the riparian owner, for which the law affords proper redress.

Id., 193 NW at 397. The *Doemel* Court had cited *Illinois Central R Co* v *Illinois*, 146 US 387, for the proposition that the riparian's right of exclusive control applies "whether the riparian owner owns the soil under the water or not." *Doemel*, 193 NW at 395, 396. Of course, after these observations, the *Doemel* Court found title between high and low water mark in the riparian. Read in context, it is clear why the *Hilt* Court cited this language from *Doemel.* That case had considered the same proposition that *Hilt* was addressing in this portion of its analysis: the extent of riparian rights when the state has title, as the *Kavanaugh* cases held.

Having demonstrated the absence of practical value to a state title to shoreland burdened by riparian rights, the *Hilt* Court then concentrated on the benefits of finding title in the riparian. Such placement would aid "in working out the recreational aspirations of the state," while title in the state would seem "destructive of the development of the lake shores." *Id.* at 226, 227. Moreover, the state "gains the right to levy and collect taxes on the relicted land, the great value of which supports the argument that such taxes will more than compensate the people for the loss of an empty title." *Id.* at 227. That empty title effected by the *Kavanaugh* cases—which by the Court's reference to *Doemel* includes the area between low and high water marks—was in *Hilt* made valuable by restoring it to the riparian.

The Department of Conservation's March 9, 1962 memorandum, by pulling the reference to *Doemel* out of context, stood the *Hilt* decision on its head, taking Justice Fead's carefully crafted presentation, and turning it into nonsense. Consider the memorandum's footnote:

> The Michigan court gave slight misinterpretation to the *Doemel* v *Jantz* case when it said that "title is in the State" below the high water mark. As seen in the following quote from this case, the Wisconsin court actually said that title is in the riparian to the water's edge, and that the state holds an easement to the high water mark.

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March 9, 1962 Memorandum, p 1 (Appendix 13). It was not Justice Fead's carefully crafted 30-page decision that misinterpreted *Doemel*, but the memo writer that misinterpreted the Court's reference to it. It would be odd indeed that an opinion of 30 printed pages on the issue of riparian title, quoting numerous authorities on the topic, reflecting substantial research and analysis, and critically analyzing the cases, would leave so important a holding to a simple reference to what another case held. It would be even more odd that such a holding be premised on a case which stands for the opposite proposition from the one asserted by the Court, as occurs by the memorandum's interpretation of Justice Fead's reference to the *Doemel* case. Finally, it is unlikely that the *Hilt* Court misunderstood a decision which it cited several times in its decision. Contrary to the conclusion of the memorandum, by his reference to *Doemel*, Justice Fead made clear his ruling was placing title to the water's edge in the riparian, including that area between high and low water marks.

The memorandum next departs from logic by jumping to the concurring opinion in *Hilt* and its view that a trust existed between high and low water marks. Of course, that view was rejected by the *Hilt* majority, resulting in Justice Potter's need to write separately. As stated above, had Justice Potter's views been accepted by the majority, they could have easily included some or all of his ten-sentence concurrence in their opinion. That they did not further clarifies their holding (if it could be any clearer).[38]

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[38] The memorandum also asserts that under *Hilt*, there are "limitations" to what a riparian can do between low and high water marks. Department of Conservation March 9, 1962 Memo, p 3 (Appendix 13). *Hilt* creates no such limitations. Further, the state has myriad ways, including the police power, to accomplish this purpose if deemed necessary by the Legislature. Of course, public trust advocates such as Tip of the Mitt and its counsel do not wish the state or its administrative departments to be confined to the police power, which is the unstated purpose of their participation herein. They prefer that the state exercise public trust rights, which "allows the state to manage these resources as a property owner without having to exercise either its regulatory police powers or its powers of eminent domain. *See* Putting the Public Trust Doctrine to Work, 2nd edition, p 8 (Coastal States Organization, 1997).

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Apparently convinced of its position as outlined in the March 9, 1962 memorandum, the Department of Conservation commissioned in May of 1962 an engineering survey to locate the ordinary high water mark along Michigan's Great Lakes shores. (*See* Appendix 15). That study was conducted in 1963. Also in 1963, the Department's files reflect a "transcript of part of the Proposed Legislation for 1963," which reflects the conclusions of the 1962 memorandum. The legislative proposal provided in part:

> Ordinary high water mark means the dividing line between the upland and the lake bed which separates the public trust area from the upland; this line is not intended to interfere with the inherent riparian rights but to fix the lakeward limits of permanent upland installations; the elevation of the ground at the line of the ordinary high water mark established for each of the Great Lakes shall be referenced to the low water datum as determined by the U.S. Lake Survey Corps of Engineers; the ordinary high water mark for Lake Superior shall be 1.5 feet above the low water datum established for Lake Superior; the ordinary high water mark for Lake Michigan-Huron shall be 3.0 feet above the low water datum established for Lake Michigan and Lake Huron; the ordinary high water mark for Lake St. Clair shall be 3.0 feet above the low water datum established for Lake St. Clair; the ordinary high water mark for Lake Erie shall be 3.0 feet above the low water datum established for Lake Erie; any structures or fill lakeward of the ordinary high water mark are subject to the provisions of this act.

(*see* Appendix 16). Finally, the Department received in November of 1963 a memorandum from the Department of Attorney General asserting that the state "has the authority to establish its rules of property at times expedient in respect of ownership of lands under navigable waters of

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A word is in order about the foregoing authority, which Tip of the Mitt characterizes as a "well respected treatise." Tip of the Mitt Brief, p 3. The Coastal States Organization is an organization of governors of coastal states dedicated to "improved [governmental] management of the nation's coasts, oceans, and Great Lakes." In his role with the Michigan Department of Natural Resources, Professor Shafer served as one of a seven-member steering committee for that work's predecessor, and was a contributor to the second edition cited above. See Powers, "Unveiling the Truth Behind the Shoreline Controversy," p 7 (Lansing Bar Briefs November 2004) (Appendix 14). The publication is not a treatise, but a tool of advocacy. For example, the work laments that "over 90 percent of the adjacent uplands [in the nation] are privately owned, raising difficulties for the public to access the trust shorelands below the ordinary high water mark." *Id.* at 2. Further, it advocates the public trust doctrine as "a useful tool" that can be used to "improve the stewardship of state trusteees" over the lands the authors believe come under the doctrine. *Id.* at xiii. In other words, the focus of the work is to use the public trust doctrine to expand governmental control of property so that such property can be "managed" by the government, to the exclusion of private citizens.

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the state." (*See* Appendix 17, p 1). It notes that in "Michigan it has been held that one owning property abutting on the Great Lakes has title both to the meander line and to the water's edge," citing *Staub*, 253 Mich 633, and *Hilt*, *supra*. *Id.* at 2. After noting a few holdings of boundary from other jurisdictions, the memo concludes:

> It is suggested that in Michigan that the ordinary high water mark used [sic] as the separation line in determining the extent of the public trust on inland waters and also the extent of the state ownership on the Great Lakes.

Id. at p 3. With the engineering study completed, the Department of Conservation in 1964[39] prepared a memorandum containing the elevations determined in the study. (*See* Appendix 18). The memorandum asserts—again without citation of authority—that "Michigan Courts have ruled that a riparian on the Great Lakes owns to the "ordinary high water mark." *Id.* at 2.

The Legislature once again amended the GLSLA in 1965, authorizing agreements for the filling of patented lands. 1965 PA 293 (*See* Appendix 19). The amendment modifies slightly the title. The Act also provides for the Department to grant certificates indicating a riparian's "lakeward boundary or indicating that the land involved has accreted to his property as a result of natural accretions or placement of a lawful, permanent structure." *Id.* Nothing in the 1965 amendment reflects an intent that the state set a boundary at the ordinary high water mark or otherwise. Clearly, the Department of Conservation's proposal to statutorily define the ordinary high water mark as a boundary was not part of the 1965 amendments.

Finally, the GLSLA was amended in 1968, and it is this amendment upon which Plaintiff and her amici rely. 1968 PA 57 (*See* Appendix 20). Notably, the title of the Act was unchanged, thus containing no hint that the purpose of the Act would be to define a boundary. The amendment changed only section 2, which defined the lands and waters covered by the Act, the

[39] The memorandum is undated, but refers to "the last 104 years reliable stage records," which records date to 1860.

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amendment further limiting the Act to lands "lying below and lakeward of the natural ordinary high water mark." *Id.*, §2. Accordingly, land had to meet each of three requirements to come within the Act. It must be:

(1) unpatented bottomland or made lands in the Great Lakes;
(2) belonging to the state or held in trust by it; and
(3) lying below and lakeward of the natural ordinary high water mark.

Id. Once again, since Defendants' land is not owned by the state or held in trust by it, it does not come within the Act. A late change to the bill assured that it would not apply to "rights as may be acquired by accretions occurring through natural means or reliction."[40]

This legislative history demonstrates that despite the efforts and opinions of the Department of Conservation, the Legislature did not amend the GLSLA to define a boundary between the state and the riparian, and the matter remains one of the common law as reflected by *Hilt* and its progeny.[41]

(3) The Errant Interpretation Given the GLSLA By State Agencies Is Not Binding On This Court.

Unfortunately, both Departments continue to broadly assert and publish their claims of title in the state up to the ordinary high water mark. (*See* Appendix 21). An "agency interpretation cannot overcome the plain meaning of a statute." *In re Complaint of Consumers Energy Co*, 255 Mich App 496; 660 NW2d 785 (2002), citing *Ludington Service Corp* v *Acting Comm'r of Insurance*, 444 Mich 481; 511 NW2d 661 (1994). If ambiguous, this Court gives some deference to an administrative interpretation, but "ultimately it is this Court's duty to

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[40] By differentiating between "accretions occurring through natural means" and simply "reliction," the statute excludes relicted lands due not only to natural water level changes, but to man-made changes such as diversion and dredging.

[41] Amicus Tip of the Mitt has provided a press release asserting that the release is "from" Representative Raymond L. Baker, the proponent of the bill. The press release quotes the Representative, but amicus offers no other proof it is "from" him. Several copies appear in the

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construe statutes and to determine the legislative intent underlying them." *Lakeshore Public Schools Board of Education* v *Grindstaff*, 436 Mich 339, 359; 461 NW2d 651 (1990).

The faulty legal reasoning and interpretations of the GLSLA proffered by the Department of Conservation and the Attorney General were well followed in a 1978 published opinion of the Attorney General. *See* OAG 1977-1978, No 5327 (July 6, 1978). The opinion also asserts that the GLSLA "indicates the dividing line between the upland and the submerged land is the ordinary high water mark," and that "the riparian ownership extends to this line." *Id.* Yet the opinion offers no analysis to support this conclusion, nor does it explain how the Legislature could redefine the riparian border in favor of the state without compensating the riparian. An attorney general opinion is not binding on this Court, and this Court should reject the 1978 opinion in that regard. *Danse Corporation* v *City of Madison Heights*, 466 Mich 175; 644 NW2d 721 (2002).

III. REAFFIRMING *HILT* WILL NOT HAVE THE ADVERSE EFFECTS WHICH PLAINTIFF AND AMICI ASSERT.

If this Court reaffirms *Hilt* v *Weber*, Plaintiff and her amici warn of grave consequences for this state. Plaintiff asserts such a ruling will "compel Plaintiff and other members of the public to walk in the waters of the Great Lakes to avoid trespassing on private property rights." (Plaintiff's Brief, p 49), implying that the traditional Michigan "beachwalk" will suddenly become a thing of the past. Such is not the case.

In Michigan, criminal trespass requires continued entry after being notified to depart. MCL 750.552. Although much of Lake Huron's wild and unenclosed beaches have been private for perhaps Plaintiff's entire lifetime, she relates free and uninterrupted use of the Lake's

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Department's file. A press release certainly shows the intent of the proponent, but not necessarily that of the Legislature.

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beaches for decades. Plaintiff's Brief, p 1. That she has used Lake Huron's beaches for decades, apparently without previously being asked to depart, is the best evidence of what will occur if this Court reaffirms *Hilt*: riparian owners will continue allowing the public to walk Michigan's shores.

This Court has wisely adopted rulings which encourage private owners to allow public access. For example, in *Du Mez* v *Dykstra*, 257 Mich 449; 241 NW 182 (1932), in rejecting a claim of prescriptive easement, the Court said:

> One may acquire a right of way by prescription over wild and uninclosed lands. But, while use alone may give notice of adverse claim of inclosed premises, the weight of authority is that it raises no presumption of hostility in the use of wild lands. This distinction is in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance. The custom had been particularly general as to logging roads over timber lands until the carelessness of hunters and campers produced such fire hazards that the protection of timber required the permission to be circumscribed. The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other's lands by way of legal presumption, but it requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription (emphasis added).

Id. at 451. Thus, this Court has acknowledged the general custom which Plaintiff has observed for decades. Reaffirming title to Michigan's shores in riparians will not change the long-established custom of riparians to allow the public to walk the beaches unimpeded. Continued protection of private rights, as the Court of Appeals did in *Kempf* v *Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976) (rejecting establishment of public beach use rights by prescription), assures the continuation of this custom.

Vesting Michigan's shores in the public does not necessarily assure Plaintiff's continued beach walks, but merely subjects them to public control. For example, like Michigan's state

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parks, if vested in the public, Michigan's beaches would be subject to the imposition of user fees and public regulations that are enforced criminally.

Nor will reaffirmation of *Hilt* threaten Great Lakes ecology, as suggested by Amicus Tip of the Mitt. Tip of the Mitt Brief, pp 27-31. Both the Legislature and local governments have police power to reasonably regulate activities on Michigan's shores, as on all other Michigan lands. Indeed, the Legislature has enacted numerous such laws. For example, the Shorelands Protection and Management Act, MCL 324.32301, specifically regulates riparian beaches designated in the Act.

CONCLUSION

The lake shore which the Circuit Court wrongfully appropriated from the Defendants in this case belongs to the Defendants as riparian owners, as clarified in the last century by the Michigan Supreme Court in *Hilt* (1930) and *Peterman* (1994), and by the U.S. Supreme Court in *Massachusetts* v *New York* (1925). No reported decision has since held to the contrary. The Great Lakes Submerged Lands Act does not, and constitutionally could not, change the ownership of Defendants' riparian property, and again, no case has ever held to the contrary. The legislative history provides no support for a conclusion that the Act established a boundary, and Department of Conservation efforts to do so failed.

The Court of Appeals reached the proper result, but in an otherwise well-reasoned decision, erred in declaring title to dry land below the high water mark as being held in fee by the state (and by failing to find the Great Lakes Submerged Lands Act inapplicable as a result). The Court was no doubt led astray by the well-publicized but inaccurate administrative interpretations of the law. Under Michigan law, at least when not covered by water, fee title is held by the riparian owner, free of the public trust. Whether the state's right of navigation has any applicability to that title is not before the Court. But in no case does the right of navigation

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grant Plaintiff any right to interfere with Defendants' exclusive use of their dry land by traversing upon it. The erroneous declaration of fee title by the Court of Appeals was *dicta* in direct conflict with this Court's rulings in *Hilt* and *Peterman.*

Michigan's 3,288 miles of shoreline is perhaps some of the most cherished and expensive real estate in the world. Taxes generated by this property have long served, and continue to serve, to fund local governments and schools, and the property supports our nation's number one industry (and our state's number two industry), travel and tourism, of which beaches are the primary factor (*See* Houston, "The Economic Value of Beaches—A 2002 Update," Appendix 22). Assertions of ownership by state and federal agencies, as well as Plaintiff and those similarly situated, cloud riparian titles, negatively impacting real estate values and the resulting tax base.

Amici Save Our Shoreline and IGLC respectfully request that this Honorable Court affirm the result of the Court of Appeals, but vacate portions of the decision, including that language at pages 7 and 9, which assert that the state holds title to dry land between low and high water mark, in trust or otherwise, and issue a decision holding that the Great Lakes riparian owner holds title in fee to the water's edge, at whatever stage, free from the public trust.

Dated: February 9, 2005

Respectfully submitted,

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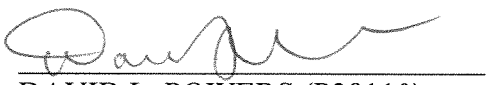
Attorneys for Save Our Shoreline and
Great Lakes Coalition, Inc.

By: 

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